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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WAYNE ALLEN ARMSTRONG, Defendant and Appellant.	E048303 (Super.Ct.No. RIF140797) **OPINION**

APPEAL from the Superior Court of Riverside County. John G. Evans, Judge. Affirmed.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and James D. Dutton and Alana Cohen Butler, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Wayne Allen Armstrong guilty of 13 counts of grand theft by false pretense. (Pen. Code, §§ 484, 487, subd. (a).)[1] The jury also found true that in the commission of counts 1, 2, 4, 8, 9, and 13, defendant took property in excess of $50,000 (§ 12022.6, subd. (a)(1)); that in the commission of count 10, defendant took property in excess of $150,000 (*id.*, subd. (a)(2)); and that in the commission of count 5, defendant took property in excess of $1 million (*id.*, subd. (a)(3)). The jury further found true that defendant committed two or more fraud- or embezzlement-related felonies involving a pattern of conduct which amounted to more than $500,000 of loss within the meaning of section 186.11, subdivision (a)(2). As a result, defendant was sentenced to a total term of 14 years 8 months in state prison with credit for time served. On appeal, defendant contends that all of the counts, with the exception of count 2, must be reversed because they were barred by the statute of limitations. We reject this contention and affirm the judgment.

I

FACTUAL BACKGROUND

In general, between 2000 and 2004, defendant, operating a sham investment company and portraying himself to be a very wealthy, generous man, defrauded 13 would-be investors out of nearly $2 million. He informed the victims he would be investing money overseas; in reality, however, defendant used the money to fund his

[1] All future statutory references are to the Penal Code unless otherwise stated.

extravagant lifestyle and to pay for his mortgage, his car, and his gambling debts. All of the victims believed their investments were safe. They received quarterly statements from defendant until January 2004, and defendant generally maintained contact with them.

The fraud involving the victims with Riverside County connections were identified during an investigation of defendant in San Diego County. Sometime in 2002, San Diego County District Attorney Investigator Daniel Simas joined an ongoing investigation of defendant's financial dealings involving individuals in the San Diego area. During the course of that investigation, in April or May 2004, Investigator Simas discovered potential additional victims in Riverside County after receiving telephone calls from individuals in Florida and Massachusetts. He thereafter contacted Riverside County District Attorney Investigator Stephen Kirby with that information.

After Investigator Kirby received the information from Investigator Simas in "March, April, May of 2004," Investigator Kirby began contacting and interviewing the potential victims. While some of the victims lived in Riverside County, others lived in Orange County, Massachusetts, and Florida. Ultimately, Investigator Kirby determined there were 13 victims of defendant's fraudulent scheme.

Subsequently, Investigator Kirby executed search warrants on nine of defendant's bank accounts. An analysis of the bank statements revealed that the deposited funds received by defendant from the 13 victims were used to pay for defendant's personal

expenses, debts, and gambling rather than for investment purposes. Defendant admitted he used the purported investments for his personal expenses and debts.

Defendant "lulled" the victims by giving them a false sense of security to make them feel as if their investments were fine. He maintained correspondence with the victims by sending them quarterly statements and generally being communicative with the victims via e-mails and faxes. When delays occurred with communications, defendant would explain that he had been traveling or was overseas and catching up on his communications. When a victim requested to withdraw money, defendant provided him or her with plausible explanations as to why that was not possible at that time.

We recount the details of the victims' testimonies as pertinent to the statute of limitations issue raised in this appeal.

A. *Count 1—Kathleen Brewer*

Kathleen Brewer invested a total of $65,000 with defendant in December 2001 and February 2002. Subsequently, defendant sent her quarterly statements showing her where her money was invested and how it was doing. On two separate occasions, Brewer sought to withdraw $2,000 from her account, and received a cashier's check and a personal check in that amount from defendant.

By late 2003, Brewer had some concerns about her investment but still believed her money was safely invested. Brewer received a quarterly statement in January 2004. By April 2004, after receiving many excuses from defendant, Brewer really had concerns

about her money. Brewer reported defendant to the Orange County Sheriff's Department in July 2004.

B. *Count 2—Arian Bunthanom*

Arian Bunthanom, a blackjack dealer at a casino where defendant regularly played, invested $60,000 with defendant in February 2004. Shortly thereafter, Bunthanom became concerned about his money and learned that there was an ongoing investigation of defendant in San Diego County.

C. *Count 3—Timothy Chesire*

In total, Timothy Chesire invested $20,000 with defendant in December 2000 and April 2001. Defendant sent Chesire quarterly statements. In 2003, Chesire contacted defendant to get $6,000 back. Chesire received the money several months later. Because it took so long to get the investment returned, Chesire was concerned "if it was a legitimate investment."

D. *Count 4—Russ Olson*

Russ Olson invested a total of $115,000 with defendant from September through November 2003 and received a deed of trust for defendant's house as collateral. He also received quarterly statements. At some time in 2003, Olson gave defendant a short-term personal loan, which defendant did not pay back but instead added to Olson's investment account. Olson did not try to contact defendant to get his money back until 2004.

E. *Count 5—John Regish*

John Regish, a certified financial planner and Internal Revenue Service trained certified public accountant for 40 years, invested $1.12 million with defendant from December 6, 2000, through January 3, 2003. Regish, who was an expert in financing and knowledgeable in the type of investing defendant conveyed to Regish, received quarterly statements from defendant and, upon checking the figures, found the statements to be accurate and reflective of their investment agreements. In his experience and training, the investments did not raise any red flags.

As part of his investment, in 2002, Regish invested $50,000 with defendant from his retirement account based on assurances from defendant that the funds would be returned within 60 days to avoid negative tax consequences. Regish was concerned about his money once in late 2002 when he called defendant to return the $50,000. However, once defendant told him he would take care of the tax consequences for him, Regish was no longer concerned.

In January 2003, Regish again requested defendant to return the money to his retirement account. Defendant told Regish not to worry about the taxes and penalties because he would take care of everything. In April 2003, defendant told Regish that his account would be closed and settled. From April through July 2003, defendant told Regish he would disperse the funds in his account but repeatedly made excuses why the funds were not dispersed. On January 1, 2004, defendant provided Regish with a quarterly statement and letter explaining why he had not transferred the funds to Regish.

Regish believed defendant's excuses were reasonable. Based on his experience in banking and financing, Regish was never worried about his money; he felt comfortable with the condition of his investment; and he believed defendant had invested his money in high-grade securities. Regish's wife, however, did not trust defendant, but her distrust had no bearing on Regish, who continued to believe in defendant.[2]

F. *Counts 6 through 10—The Rehbein Family*[3]

In June 2001, Scott Rehbein invested about $187,000 with defendant. Scott subsequently received quarterly statements from defendant showing the value of his investment. The last quarterly statement he received was in January 2004.

In 2002, Scott asked defendant to return $5,000 to him. Defendant complied. In 2003, Scott asked defendant to return $20,000 to him; defendant, however, made up excuses, such as that the money was tied up in European investments and he needed more time. Scott essentially believed defendant and never questioned whether his money was safe or not.

By 2003, Scott stopped receiving his quarterly statements on a regular basis and, when questioned, defendant gave him an array of excuses as to why he was unable to get the statements out. This caused Scott to be concerned about the statements, but not about

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[2] Regish's wife became suspicious and contacted the Securities and Exchange Commission. However, Regish did not invest her money, as they maintained separate accounts, so she was not a victim in this case.

[3] Because the Rehbein family all share the same last name, we will refer to them by their first names for clarity and ease of reference; no disrespect is intended.

his money. Because defendant had always been in contact with him, Scott explained that he was never concerned or worried about the safety of his money until June 2004.

Over the successive years, Scott put his family in contact with defendant to be additional investors. Scott's brother, Keith Rehbein, invested a total of $73,000 with defendant in July and August 2002. Keith received communications from defendant, as well as quarterly statements, regarding his investment. Keith was not concerned about his money until April 2004, when he came to California to speak with defendant about getting his money out and was informed that defendant was involved in a court case.

Scott's brother, Karl Rehbein, invested a total of $24,000 with defendant in July 2001 and March 2002. Karl also received quarterly statements from defendant and had no concerns about his money.

Scott's brother, Mark Rehbein, invested a total of $79,500 with defendant from July 2001 to January 2003. Defendant stayed in contact with Mark. Mark also received quarterly statements from defendant and had no concerns about the safety of his money.

Scott's parents, Maureen and Gary Rehbein, also invested with defendant. They invested a total of $15,000, and were not concerned about the safety of their money or whether the investment was bad. They received quarterly statements until January 2004 and believed their investment was fine.

G. *Count 11—Alan Silva*

In August 2001, Alan Silva invested $10,000 with defendant and also received quarterly statements. Silva never asked for his money and was never worried about the investment.

H. *Count 12—Barbara Vuoso*

Barbara Vuosu invested a total of $8,500 with defendant in 2003 and 2004, and also received quarterly statements. She never attempted to get her money back and was generally not concerned about her money. She sensed something was amiss "well into 2004."

I. *Count 13—Dawn Wilson*

Dawn Wilson gave defendant $120,000 to invest overseas in February 2003. In August 2003, she asked defendant to withdraw her investment so she could buy a restaurant. Defendant told her he would get her money back within a week. When the funds were not returned, Wilson contacted defendant several times; however, he gave her different excuses as to why he could not obtain the funds, such as that the account had been frozen by another investor or that another investor was being investigated for embezzlement. By October 2003, Wilson was getting "a little" concerned and frustrated about getting her money back. Wilson explained she was not so concerned about getting her money back at that time, but she was concerned she was not going to have the money back in time to pay for the restaurant. Wilson still had hopes as of early 2004 that she would be getting her money.

The last conversation Wilson had with defendant was in April 2004. At that time, Wilson still believed she was going to get her money back, as well as a return on her investment. Defendant continued to send Wilson quarterly statements showing her investment and how her investment was making money. She was not concerned about getting her money back until April 8, 2004, after she received a disturbing fax and defendant stopped returning her calls.

II

DISCUSSION

Defendant contends that all of his convictions, with the exception of count 2, should be reversed because they were barred by the statute of limitations. Specifically, he claims that law enforcement was aware of defendant's criminal activities as early as 2002 and were not reasonably diligent in identifying the victims in this case. He also argues victims Regish (count 5), Scott (count 10), and Wilson (count 13) knew, or should have discovered, that defendant had perpetuated a fraud prior to December 21, 2003.

A defendant may assert a statute of limitations defense as a fact-based issue at trial. (*People v. Moore* (2009) 176 Cal.App.4th 687, 693.) The parties agree that the statute of limitations is not an element of the crime, and the prosecution bears the burden of proving by a preponderance of the evidence that the case is not barred by the statute of limitations. (*People v. Castillo* (2008) 168 Cal.App.4th 364, 369.)

When an appellate court is reviewing a statute of limitations question after a conviction for the charged offenses, the proper question is whether the record

demonstrates that the crime charged actually fell within the applicable statute of limitations. (*People v. Smith* (2002) 98 Cal.App.4th 1182, 1192-1193.) If the statute of limitations issue has been tried to a jury, the question on appeal is whether the jury's implied findings are supported by substantial evidence. (*People v. Castillo*, *supra*, 168 Cal.App.4th at p. 369.)

Our review is akin to our review for sufficiency of the evidence of a civil judgment—the sufficiency of the evidence to support a finding that had to be shown by a preponderance of the evidence. (See Evid. Code, § 115.) "In reviewing the evidence on such an appeal all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. . . . [Our] power . . . begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429; see also *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.)

Defendant here was charged with grand theft by false pretense. (§§ 484, 487.) Section 803, subdivision (c) states that a four-year statute of limitations applies to offenses in which a material element "is fraud or breach of a fiduciary obligation," and specifically includes "[g]rand theft of any type" and forgery. (*Id.*, subd. (c)(1).) "Crimes not specifically delineated are included under [section 803, subdivision (c)'s] umbrella as

long as the crimes have as their core, or a material element of the crime is, fraud or breach of a fiduciary obligation. [Citations.]" (*People v. Guevara* (2004) 121 Cal.App.4th 17, 25.)

The parties herein agree that the statute of limitations applicable to the charges in this case is four years pursuant to sections 801.5 and 803, subdivision (c). (See, e.g., *People v. Moore, supra,* 176 Cal.App.4th at p. 692; *People v. Guevara*, *supra*, 121 Cal.App.4th at p. 25.) The complaint in this case was filed on December 21, 2007. Therefore, as the People point out, "had the crimes been discovered prior to December 21, 2003, the prosecution would be barred by the statute of limitations."

"'[D]iscovery' is not synonymous with actual knowledge. [Citation.] 'The statute commences to run . . . after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry. . . . "Every person who has actual notice of circumstances *sufficient to put a prudent man upon inquiry* as to a particular fact, has constructive notice of the fact itself in all cases in which, by [pursuing] such inquiry, he *might* have learned such fact."' [Citation.]" (*People v. Zamora* (1976) 18 Cal.3d 538, 561-562.) "The crucial determination is whether law enforcement authorities or the victim had actual notice *of circumstances sufficient to make them suspicious of fraud thereby leading them to make inquiries which might have revealed the fraud*." (*Id*. at pp. 571-572.)

A suspicion of *wrongdoing* is not enough. (*People v. Crossman* (1989) 210 Cal.App.3d 476, 481.) "[I]t is the discovery of the *crime*, and not just a loss, that triggers

the running of the statute." (*People v. Lopez* (1997) 52 Cal.App.4th 233, 246, fn. 4, italics added; see also *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 330-331 [person must be aware a crime has occurred].) For example, "the loss of an investment is not necessarily a legal injury, as many investors have good reason to know." (*Cleveland v. Internet Specialties West, Inc.* (2009) 171 Cal.App.4th 24, 32.)

Furthermore, even when the victim becomes suspicious that a fraud may have been committed, the defendant's subsequent reassurances may allay the victim's concerns and legitimately delay the discovery of the fraud. (See *Garrett v. Perry* (1959) 53 Cal.2d 178, 181-182 [fact finder could properly conclude that the plaintiff's suspicions arising from investigation were allayed by the defendant's subsequent reassurances]; *Hartong v. Partake, Inc.* (1968) 266 Cal.App.2d 942, 965-966 [even if the plaintiff discovers some suspicious circumstances, his reliance is reasonable if the defendant allays his doubts with further assurances]; *Brownlee v. Vang* (1965) 235 Cal.App.2d 465, 470-478 [when a buyer has only a suspicion of the fraud, and the defrauding seller lulls the buyer into a sense of security by both words and conduct, the seller cannot assert that the buyer lost rights by waiving the suspicion and accepting the reassurance]; *Blackman v. Howes* (1947) 82 Cal.App.2d 275, 279 [same]; *Alton v. Rogers* (1954) 127 Cal.App.2d 667, 680 [in view of confidential relationship between the parties, the plaintiff was legally entitled to rely on the many reassurances of the defendant that everything was all right, and this legitimately delayed discovery of the fraud].) It has been said that when the delay is created by the defendant's ongoing fraudulent concealment to prevent

discovery of the fraud, "it is difficult to sympathize. . . . While [the defendant] obviously intended to prevent his crimes from *ever* being detected, he certainly consciously acted to create the maximum delay in discovery. Having thus acted, he should not now be heard to complain he would have desired to have been tried sooner." (*People v. Kronemyer*, *supra*, 189 Cal.App.3d at p. 331.)

In sum, a jury cannot convict a defendant of a fraud-related crime if it finds that in the exercise of reasonable diligence on the part of the victim or law enforcement authorities, the fraud should have been discovered within the limitations period.

In this case, defendant asserts that law enforcement diligence should have discovered the fraud prior to January 2004 since they were "actively investigating" defendant as early as 2002, and the banking information available to San Diego law enforcement would have revealed the substantial deposits from the victims in this case. However, the evidence adduced at trial showed that Investigator Simas of the San Diego County District Attorney's Office was unaware of the victims involved in this case until 2004. Investigator Simas testified that during the course of the San Diego investigation, he learned in April or May 2004 that there were potential victims in Riverside County. He discovered this information after he received a call from an individual who lived in Florida. He also recalled that after the Florida call he received calls from persons in Massachusetts.[4] Investigator Simas explained that, to the best of his recollection, this

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[4] Victim Scott resided in Florida. Victims Keith, Mark, and Regish resided in Massachusetts.

was the first he had heard of victims outside the San Diego County case. Shortly thereafter, Investigator Simas contacted the Riverside County District Attorney's Office and spoke with Investigator Kirby about the victims with the Riverside County connections. Investigator Kirby corroborated Investigator Simas's recollection and testified that he was contacted by Investigator Simas in March, April, or May 2004. Based on the foregoing, we conclude there was substantial evidence to support the jury's finding that law enforcement only knew, or reasonably should have known, of defendant's crimes involving these victims in March, April, or May 2004. The mere fact that defendant was being investigated in a different county with different victims does not show that law enforcement should have been aware of the Riverside County victims. Defendant's arguments to the contrary are mere speculation and not supported by the record.

Focusing on victims Regish (count 5), Scott (count 10), and Wilson (count 13), defendant also contends these victims should have had notice of circumstances sufficient to make a reasonably prudent person suspicious of fraud before December 21, 2003. Defendant's assertion that Regish, Scott, and Wilson had notice of circumstances sufficient to make them suspicious of fraud relies, in great part, on these victims' testimonies that defendant failed to return their investments at the conclusion of the investment period or upon being asked to return the funds.

As to Regish, the record established he was an expert in financing and that he began investing with defendant in 2000, and continued to do so until January 2003. He

continued to receive accurate quarterly statements, which showed his investment had done well, from defendant. The only time Regish felt concerned about his money was when he asked defendant to return his short-term $50,000 investment to avoid negative tax consequences. However, defendant reassured him that his money was earning more than the penalties and offered to pay the penalties for Regish. At that point, Regish was no longer concerned. This evidence supported the inference that Regish was concerned about the negative tax consequences, not that defendant was involved in criminal conduct.

Regish received another quarterly statement and reassurance letter from defendant dated January 1, 2004, and remained comfortable with his investment at that time. Regish maintained he was not concerned with his investment as of January 2004, since he continued to receive accurate quarterly statements and assurances from defendant. In addition, even though defendant had informed Regish in April 2003 that Regish's account would be closed and settled and Regish still had not received the funds, Regish believed defendant's excuses as to why the funds were not dispersed to be reasonable. The fact that Regish's wife distrusted defendant does not change the fact that he did not know of defendant's criminal activities or that he should have been aware of defendant's criminal conduct. Regish, an experienced accountant, never really felt that something was wrong, and he trusted defendant. Even if Regish was concerned about his investment when defendant failed to return the $50,000 or close his account and disperse the funds, the evidence shows that these were suspicions of wrongdoing, not a crime.

This record provides substantial evidence to support the jury's conclusion that a reasonably prudent person in Regish's position would not have suspected defendant of fraud, as defendant contends.

As to Scott, defendant argues Scott should have been concerned with his $187,000 investment "when in 2003, after two years, he stopped getting statements from [defendant]," and when in December 2003, he requested to withdraw $20,000 but defendant failed to return his calls or give him the money. He states the above evidence should have led to further investigation and raised a suspicion that defendant was involved in criminal activities. The record, however, supports the opposite inference. First, when Scott requested that defendant return $5,000 of his investment in 2002, defendant complied. Second, like all of the other victims, defendant received quarterly statements regularly, until they became more sporadic in 2003. The last quarterly statement he received was in January 2004. Third, in regard to the return of the $20,000, defendant gave excuses why he could not do so. Finally, Scott testified he did not worry about the safety of his investment until June 2004. The evidence shows that defendant remained in contact with Scott, giving him excuses why he failed to provide a couple of quarterly statements in 2003 and why he failed to return the $20,000. Thus, substantial evidence supports the jury's conclusion that defendant's reasonable excuses, assurances, and quarterly statements would have allayed a reasonably prudent person's concerns at that time.

Lastly, as to Wilson, defendant points to Wilson's repeated requests to return her $120,000 investment so she could purchase a restaurant and defendant's failure to do so. Defendant essentially claims that because he did not comply, Wilson had actual notice of circumstances sufficient to make her suspicious of fraud. Not so. Wilson explained she was concerned she would lose the restaurant she sought to buy as a result of her not having the funds; she was not concerned whether she would be getting her money back. Indeed, she testified she still had hopes as of early 2004 that she would be getting her money. Defendant continued to send Wilson quarterly statements, and the last conversation Wilson had with defendant was in April 2004. At that time, Wilson still believed she was going to get her money back, as well as a return on her investment. She was not concerned about getting her money back until April 8, 2004, after she received a disturbing fax and defendant stopped returning her calls. As far as Wilson knew, up until April 2004, she believed she would get her investment back. The evidence shows that Wilson was simply frustrated that she was not getting her money back, not that she knew defendant was involved in a fraudulent scheme. Accordingly, the record supports the inference that the circumstances would not have led a reasonably prudent person to suspect defendant of any crime at that time.

Moreover, the record is clear that defendant lured the victims by giving them a false sense of security to make them feel as if their investments were fine. He maintained correspondence with all of the victims by sending them quarterly statements and generally being communicative with the victims via e-mails and faxes. When delays

occurred with communications, defendant explained to the victims that he had been traveling or overseas and was catching up on his communications. In addition, when a victim requested to withdraw his or her money, defendant provided them with plausible explanations why it was not possible at that time.

Our review of the record reveals substantial evidence to support the jury's findings that the prosecution complied with the statute of limitations on the counts.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

McKINSTER
J.